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Vigen a/l Sinnaya v Public Prosecutor

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COURT OF APPEAL ('PUTRAJAYA) — CRIMINAL APPEAL NO J-05–197 OF 2010
SULONG MATJERAIE, ABDUL WAHAB PATAIL AND AZAHAR MOHAMED JJCA
1 NOVEMBER 2011

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Criminal Law — Murder — Defence of grave and sudden provocation — Whether defence proved upon balance of probabilities — Whether there was 'cooling-off' period before strangulation occurred — Whether denial of conjugal rights by spouse could amount to provocation — Failure to put appellant's version of events to prosecution's eyewitness — Whether weight and credibility given to appellant's story thereby affected

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The appellant was tried and convicted for the murder of his wife. He had caused her death by strangulating her with his bare hands. When his defence was called during the trial, the appellant said he never intended to kill the deceased but that at the material time he was subjected to grave and sudden provocation which caused him to lose his self-control. After he had strangled his wife, the appellant went to the police station to surrender himself and to report that he had strangled her following a quarrel, that she had lost consciousness as a result and that he had thereafter taken her to hospital where she was confirmed dead. The trial judge held the appellant had had a 'cooling-off' period before he caused his wife's death and that therefore the appellant had failed to prove the defence of grave and sudden provocation on a balance of probabilities. The appellant appealed to the Court of Appeal against conviction and sentence. The prosecution's main witness, PW6, who was the sister-in-law of the deceased, had testified during the trial that on the morning in question she went to the deceased's house at her request and saw the appellant and the deceased in the midst of a quarrel. When the quarrel continued in the main bedroom, PW6 said she went to have a look and saw the appellant strangling the deceased. PW6's attempts to pull the appellant away were unsuccessful. She then noticed the deceased fall to the floor and having difficulty breathing. PW6 said she rushed to her house nearby to get her mother-in-law to help but their attempts to revive the deceased failed and she was taken to hospital. The appellant's counsel did not dispute PW6's testimony during the prosecution's case and did not put to PW6 the reason for the quarrel. In his defence, the appellant alleged that what caused him to be provoked was the repeated accusation that he had not settled a RM10,000 debt to his mother-in-law as well as his wife's denial to others of his complaint that she refused to sleep with him. According to the appellant's version of the events, he said he was together with PW6 and the deceased at his house on the morning

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in question to discuss domestic problems when a quarrel ensued about whether or not he slept with the deceased. In a rage, he announced he was leaving for his mother's house, packed his clothes and left on his motorcycle but when he had reached a junction nearby he received a call on his cellphone from PW6 saying the deceased disputed that she had denied him his conjugal rights. PW6 then passed the phone to the deceased to speak but the appellant said he lost his temper, returned to the house, and, at first, assaulted the deceased with an aluminium pot. He then grabbed her by the neck and pushed her onto the bed and when she fell, he sat on her and held her neck with both his hands whilst shouting that she had destroyed his life. He said the deceased became silent and seemed to be holding her breath before she closed her eyes and lost consciousness. The appellant said the whole event was witnessed by PW6.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The appellant's version of events involved PW6 extensively and ought to have been put to her. It was not. His version only emerged when he testified. The facts he relied upon were not tested before the trial judge against another witness who was there. By such failure the appellant denied himself of the benefit of the trial judge being enabled to determine if his version was safe to rely on, and if so, to give a greater weight to it. This was particularly important in the light of the burden that was upon him to prove his defence on a balance of probabilities (see para 22).

(2) Putting the appellant's version to PW6 would have enabled the trial judge to see and hear PW6's responses and decide whose version was more credible and safer to accept. Without putting his version to PW6, it was impossible to give much weight to the appellant's untested version (see para 19).

(3) Even if the appellant's version of facts was accepted, nothing in evidence showed how long or how soon was the telephone call between his leaving the house, arriving at the junction and arriving back at the house to attack the deceased to discharge his burden of proving that the provocation, even if it was grave, was sudden enough before the act of strangulation to prevent the offence from amounting to murder (see para 28).

(4) On the face of it, there was time to cool off before he received the telephone call at the junction. Even if that were accepted as provocation, then, on the face of it, he had to turn around and go back. But there was no evidence to show how soon after that provocation he committed the strangulation. The question of how sudden must the provocation be to be enough to prevent the offence from amounting to murder did not arise for consideration (see para 28).

(5) Denial of conjugal rights by a spouse could never be accepted as a provocation by that spouse, let alone a grave provocation (see para 29)

(6) The provocation in this case must have referred to repeated accusation of not paying off a debt to his mother-in-law and that he was lying when he said he was denied conjugal rights. Repetition of the accusation when he had already left the house and was at the junction could at best be termed as the straw that broke the camel's back, but it was not a provocation so grave and sudden as to prevent his offence from amounting to murder (see paras 29 & 30).

[Bahasa Malaysia summary

Perayu telah dibicarakan dan didapati bersalah kerana membunuh isterinya. Dia telah menyebabkan kematian itu dengan mencekik si mati dengan tangannya. Apabila pembelaan dipanggil semasa perbicaraan, perayu berkata dia tidak pernah berniat untuk membunuh si mati tetapi pada masa material dia mengalami bangkitan marah besar dan mengejut yang menyebabkan beliau hilang kawalan diri. Selepas mencekik isterinya, perayu pergi ke balai polis untuk menyerah diri dan melaporkan bahawa dia mencekik si mati berikutan satu pergaduhan, bahawa akibatnya si mati telah tidak sedarkan diri dan bahawa selepas itu dia dibawa ke hospital di mana dia telah disahkan mati. Hakim bicara memutuskan bahawa perayu mempunyai tempoh 'bertenang' sebelum dia menyebabkan kematian isterinya dan dengan itu perayu telah gagal untuk membuktikan pembelaan bangkitan marah besar dan mengejut pada imbangan kebarangkalian. Perayu merayu kepada Mahkamah Rayuan terhadap sabitan dan hukuman. Saksi utama pendakwaan, PW6, iaitu adik ipar si mati, telah memberi keterangan semasa perbicaraan bahawa pada pagi kejadian, dia pergi ke rumah si mati atas permintaan si mati dan melihat perayu dan si mati sedang bergaduh. Apabila pergaduhan berterusan ke bilik tidur utama, PW6 berkata bahawa dia telah pergi melihat dan menyaksikan perayu mencekik si mati. Percubaan PW6 menarik perayu tidak berjaya. Dia kemudiannya melihat si mati jatuh ke lantai dan mengalami kesukaran untuk bernafas. PW6 berkata bahawa dia bergegas ke rumahnya yang berhampiran untuk mendapatkan ibu mertuanya untuk membantu tetapi percubaan mereka untuk memulihkan si mati gagal dan dia telah dibawa ke hospital. Peguam perayu tidak mempertikaikan kesaksian PW6 semasa kes pendakwaan dan tidak menyoal PW6 sebab pergaduhan. Dalam pembelaannya, perayu mendakwa bahawa apa yang menyebabkan dia diprovokasi adalah tuduhan berulang-kali bahawa dia tidak menyelesaikan hutang RM10,000 kepada ibu mertuanya serta penafian isterinya kepada orang lain bahawa si mati enggan untuk tidur bersamanya. Menurut versi perayu, dia mengatakan bahawa dia, bersama-sama dengan PW6 dan si mati berada di rumahnya pada pagi kejadian untuk membincangkan masalah rumahtangga apabila pergaduhan mengenai sama ada ada atau tidak dia tidur dengan si mati. Dalam keadaan marah, dia memberitahu si mati bahawa dia akan ke rumah ibunya, menyiapkan pakaian-pakaiannya dan meninggalkan rumah dengan motosikalnya tetapi apabila sampai ke simpang jalan berdekatan dia menerima panggilan di telefon bimbitnya daripada PW6 berkata si mati mempertikaikan bahawa si mati telah

menafikannya hak perkahwinan. PW6 kemudian memberi telefon kepada si mati untuk bercakap tetapi perayu mengatakan bahawa dia hilang sabar, pulang ke rumah, dan, pada mulanya, menyerang si mati dengan periuk aluminium. Dia kemudian menarik leher si mati dan menolaknya ke katil dan apabila si mati jatuh, perayu duduk di atasnya dan memegang leher si mati dengan kedua-dua tangannya sambil menjerit-jerit bahawa si mati telah memusnahkan hidupnya. Dia berkata si mati menjadi senyap dan seolah-olah menahan nafas sebelum dia memejamkan matanya dan tidak sedarkan diri. Perayu berkata seluruh kejadian itu disaksikan oleh PW6.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Versi perayu yang melibatkan PW6 adalah luas dan sepatutnya dikemukakan kepadanya. Ia tidak dikemukan. Versinya hanya wujud apabila dia memberi keterangan. Fakta-fakta yang disandarkan oleh perayu tidak diuji di hadapan hakim bicara terhadap seorang saksi lain yang berada di situ. Dengan kegagalan tersebut, perayu menafikan dirinya manfaat hakim bicara untuk menentukan sama ada versinya selamat untuk disandarkan dan jika ya, untuk memberi imbangan yang lebih berat kepadanya. Ini adalah penting terutamanya dalam aspek beban ke atasnya untuk membuktikan pembelaan dirinya atas imbangan kebarangkalian (lihat perenggan 22).

(2) Meletakkan versi perayu ke atas PW6 akan membolehkan hakim bicara untuk melihat dan mendengar jawapan PW6 dan memutuskan versi siapa yang lebih boleh dipercayai dan selamat untuk diterima. Tanpa meletakkan versinya ke atas PW6, adalah mustahil untuk memberikan beban yang lebih kepada versi perayu yang belum diuji (lihat perenggan 19).

(3) Walaupun versi fakta perayu diterima, tiada apa-apa jua dalam keterangannya yang menunjukkan berapa lama atau berapa cepat masa antara panggilan telefon dan ketika meninggalkan rumah, tiba di persimpangan dan tiba kembali di rumah untuk menyerang si mati bagi melepaskan beban pembuktian bahawa provokasi, walaupun adalah besar, adalah cukup mengejut sebelum tindakan mencekik untuk mengelakkan kesalahan tersebut daripada terjumlah pembunuhan (lihat perenggan 28).

(4) Pada dasarnya, terdapat masa untuk bertenang sebelum dia menerima panggilan telefon di simpang jalan. Jikapun itu diterima sebagai provokasi, maka, pada dasarnya, dia telah pusing dan kembali. Tetapi tidak ada bukti untuk menunjukkan sebagaimana segera selepas provokasi itu, dia melakukan cekikan. Persoalan berapa mengejutkah provokasi mestilah cukup untuk mengelakkan kesalahan tersebut daripada terjumlah kepada membunuh tidak timbul bagi pertimbangan (lihat perenggan 28).

A (5) Penafian hak perkahwinan oleh pasangan suami isteri tidak boleh diterima sebagai satu provokasi oleh pasangan itu, apatah lagi satu bangkitan marah (lihat perenggan 29)

B (6) Provokasi dalam hal ini perlu merujuk kepada tuduhan tidak membayar hutang kepada ibu mertuanya dengan berulang kali dan bahawa dia telah berbohong apabila dia berkata dia telah dinafikan hak-hak perkahwinan. Pengulangan tuduhan tersebut apabila dia telah meninggalkan rumah dan berada di simpang jalan boleh dipanggil sebagai *the straw that broke the camel's back*, tetapi ia bukan provokasi yang besar dan mengejut yang

C boleh mengelakkan kesalahan tersebut daripada terjumlah kepada membunuh (lihat perenggan 29 & 30).]

Notes

For a case on defence of grave and sudden provocation, see 4 *Mallal's Digest*

D (4th Ed, 2010 Reissue) para 1370.

Cases referred to

Bala Anak Matik v PP [2006] 3 MLJ 516; [2006] 2 CLJ 229, CA (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ 10;

E [1983] CLJ 101 (Rep), FC (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] CLJ 143, SC (refd)
Ng Eng Kooi v PP [1970] MLJ 267, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Vijayan v PP [1975] 2 MLJ 8, CA (refd)

F **Legislation referred to**

Criminal Procedure Code s 180
Penal Code ss 299, 300, 302

Appeal from: Criminal Case No MT(4)45–60 of 2008 (High Court, Johor

G Bahru)

Paul Krishnaraja (Mohd Jafri, Anandaraj Paul & Co) for the appellant.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

H **Abdul Wahab Patail JCA:**

INTRODUCTION

I **[1]** The appellant Vigen a/l Sinnaya was tried, convicted and sentenced for an offence under s 302 of the Penal Code (Act 574) as follows:

> Bahawa, kamu pada 5 Ogos 2007 jam lebih kurang 8.30 pagi, dirumah No. 10742, Jalan Merbok 13, Bandar Putra, Kulai, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Ta'zim, telah membunuh Kavitha a/p Appalanaidu (KPT:

790718-01-5842) dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

[2] Having called upon the appellant to enter upon his defence, the learned judicial commissioner ('the trial judge') had found at the end of the trial as follows:

39 Berdasarkan kepada alasan-alasan tersebut dan setelah memperhalusi keterangan membela diri tertuduh, saya mendapati atas imbangan kebarangkalian, tertuduh telah gagal untuk membuktikan beliau telah hilang kawalan diri akibat daripada satu bangkitan marah yang besar dan mengejut. Tertuduh tidak berhak untuk mendapat perlindungan di bawah pembelaan seperti diperuntukkan di bawah Kekecualian 1 kepada s 300 Kanun Keseksaan.

[3] The appellant appealed to this court against his conviction and sentence.

THE PROSECUTION'S CASE

[4] The prosecution's case is that the appellant murdered his wife Kavitha a/p Appalanaidu by strangulation.

[5] Exhibit P4 is a police report lodged by Sargeant RF 81942 Kumarasan a/l Ramasamy ('PW1') and received by Constable R157530 Mohd Syahrizal bin Ag Mumin, that one Vigen a/l Sinnaya NRIC 750712–14–5279 had come to the police station at about 9.30am on 5 August 2007 to report that:

(a) he had a misunderstanding with his wife Kavitha a/p Appalanaidu;

(b) he had strangled her by the neck until she lost consciousness;

(c) he had taken her to the Kulai Hospital;

(d) doctor had confirmed that she had died; and

(e) had come to surrender himself.

[6] The main witness for the prosecution is one Nalini a/p Krishnan ('PW6'), the sister-in-law of the deceased. PW6 lived at No 10751, Jalan Merbok 13, Bandar Putra, Kulai. PW6 testified that at about 8.30am on that day she was at No 10742, Jalan Merbok 13, Bandar Putra, Kulai, the house of her brother-in-law Ramakirishan a/l Applanaidu. The deceased stayed in that house. PW6 had gone to the deceased's house at the latter's request, and when she arrived she saw her in the midst of a quarrel with the appellant in the living room. They then went into the main bedroom and continued to quarrel. Going into the main bedroom, PW6 saw the appellant in the act of strangling the deceased. She tried to pull the appellant away by his arm, but the appellant

was too strong and he continued to strangle the deceased until both the appellant and the deceased fell onto the bed. PW6 tried to pull the appellant's arm again. While she was doing so the deceased fell onto the floor and the appellant released her. PW6 saw the deceased's head hit the mosaic floor. Seeing the deceased having difficulty breathing, PW6 went home to bring her mother-in-law to help the deceased. PW6 and her mother-in-law went to the deceased's house. They tried to revive her, but failed. Her mother-in-law demanded the appellant to send the deceased to the Kulai Hospital. PW6 returned to her house to get her brother-in-law Ramakirishan to bring his car to the deceased's house. There the appellant brought the deceased into the car. The appellant together with PW6 and Ramakirishan took the deceased to the hospital.

[7] Counsel for the appellant did not dispute the testimony of PW6. He asked whether PW6 knew what they were quarrelling about, and suggested that the three year old son of the couple was with PW6 at the time. PW6 disagreed, and said she did not know what they were quarrelling about. Counsel left it at that during the prosecution case. He did not put to PW6 what the quarrel was about.

[8] Dr Murniza Murad ('PW5') testified that at about 9.15am she had attended to the deceased in the emergency department. PW5 had performed 'cardio pulmonary resuscitation'. Since there was no response from the deceased, the witness had declared the deceased to have died.

[9] Exhibit P7 is the post mortem report by Dr Mohamad Aznool Haidy bin Ahsorori ('PW4'). He conducted the post mortem the next morning. The deceased was identified by ASP G/15747 Abdul Hanif bin Atcha ('PW10') and Sivan a/l Vegatapod, NRIC 730614-01-6205, the brother-in-law of the deceased. PW4 gave the cause of death as being consistent with asphyxia ('Probable manual strangulation). In his post mortem report, Dr Mohamad Aznool Haidy reported, inter alia, the following:

(a) MARKS OF INJURY

(i) Faint bruise with swelling 4x3cm on the right half of the forehead.

(ii) Faint bruise with swelling 3x3cm on the back of the head.

(iii) Faint bruise with swelling 5x4cm on the right temple (5cm away from the right ear pinna).

(iv) There were two bruises 0.5x0.5cm each on the right half of the lower jaw.

(v) There were also two bruises 0.5x0.5cm each on the left half of the lower jaw.

(vi) Bruise 3x2cm on the back aspect of right arm.

(vii) There were bruises 3x2cm and 1x1cm each on the back aspect of the right arm just near to the right elbow.

(viii) Bruise 10x5cm on the front inner aspect of right arm.

(ix) Bruise 2x1cm on the back aspect of the upper right forearm.

(x) Bruise 3x2cm on the back aspect of the mid right forearm.

(xi) Bruise 3x1.5cm on the back aspect of the mid right forearm just near to the wound No 10.

(xii) Bruise 1x0.5cm on the back distal aspect of the right forearm just near to the right wrist.

(xiii) Bruise 2x0.5cm on the inner aspect of right forearm.

(xiv) Bruise 2x2cm on the inner front aspect of left forearm.

(xv) Bruise 1x1cm on the front aspect of left shoulder. There was also faint bruise 3x2cm just below to the former wound.

(xvi) Bruise 3x2cm on the front inner aspect of left arm just near to the left elbow. There was also bruise 2x2cm on the inner aspect of left cubital fossa.

(xvii) Bruise 5x4cm on the back inner aspect of the left arm.

(xviii) Multiple bruises (7x) ranging from 0.5x0.5cm to 2x2cm each on the back aspect of left forearm.

(b) SUMMARY AND CONCLUSIONS

(i) The body was that of an adult Indian female positively identified by her brother in law as the above named person.

(ii) There were multiple contusions on the both lower jaws. These injuries were in keeping pattern with that due to compression by fingers (hands).

(iii) There was features of asphyxiation in view of multiple petechieal haemorrhages on the both conjunctiva, face and lungs surface.

(iv) There were multiple bruises on the both upper limbs to suggest pattern of struggle or defensive wounds. These injuries were recent and fresh (within three days).

(v) There were few contusions on the scalp head (non-fatal). These injuries were in keeping pattern with that due to blunt trauma inflicted with blunt, hard and smooth surface such as wall, floor or table; or whichever object with similar patterns.

(vi) Those injuries as mentioned earlier were less likely consistent with pattern due to self-inflicted injury in view of the other injuries on the neck and head.

(vii) There was no significant underlying natural disease found on her body that could have caused or contributed to her death at that particular moment in time.

(viii) Those findings were consistent with that death due to asphyxia as a result of probable manual strangulation. In my opinion, the patterns were in keeping with homicide.

[10] We read the charge, the testimony of the witnesses for the prosecution, the submissions on behalf of the appellant and of the public prosecutor, and the grounds of judgment of the trial judge. The submissions for the appellant dealt with the subjects of the burden and standard of proof with regard to the ingredients of the offence under s 302 of the Penal Code, the requirement of a maximum evaluation of the evidence and that the more liberal interpretation to be given for the benefit of the accused. The defence relied upon was grave and sudden provocation. It was submitted that the appellant did not intend to kill the deceased, did not run away but had surrendered and reported the incident to the police, that the evidence of PW6 showed there was a quarrel and the appellant was in a state of anger when he laid his hands on the deceased's neck. We find that the trial judge had adequately considered the relevant law on the ingredients to be proved for an offence under s 302, as well as on evidence and procedure including burden of proof of grave and sudden provocation, and had conducted a maximum evaluation of the evidence before him. We find that he did not err against s 180 of the Criminal Procedure Code (Act 593) in calling upon the appellant herein to enter upon his defence.

THE DEFENCE

[11] The 11 grounds set out in the petition of appeal revolved not upon any error in calling upon the appellant to enter upon his defence, but focused, properly, upon the defence of grave and sudden provocation, and the evaluation of the evidence in respect of it. It was urged upon us, inter alia, that facts before and after the event ought to be taken into account, and that the trial judge had erred in holding that there was in this case a cooling off period and that the appellant had failed to prove the defence of grave and sudden provocation.

[12] We addressed our minds to the question whether the trial judge erred in his findings.

THE DEFENCE OF GRAVE AND SUDDEN PROVOCATION

[13] The defence of grave and sudden provocation is contained in the statutory provisions with regard to the offence of murder. Section 299 of the Penal Code provides that whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to

cause death, commits the offence of culpable homicide. Section 300 then provides that except in the cases excepted therein, culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

(d) if the person committing the act knows that it is imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[14] Section 300 then sets out the exceptions. Exception 1 provides for the defences of grave and sudden provocation, and mistake or accident:

> Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

[15] Since the appellant relied upon the defence of grave and sudden provocation, it is incumbent upon the appellant, as the party relying upon it, to show that the provocation was sudden and grave, and it was the deceased who gave the provocation. The standard of proof that is required is upon a balance of probabilities: *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC); *Ng Eng Kooi @ Anor v Public Prosecutor* [1970] MLJ 267 (FC); *Vijayan v Public Prosecutor* [1975] 2 MLJ 8 (CA (Singapore)); *Bala Matik v Public Prosecutor* [2006] 3 MLJ 516; [2006] 2 CLJ 229 (CA). The rule is clear. In respect of the prosecution case an accused need only raise a reasonable doubt, but in respect of a defence, he must prove the facts he relies on therefor upon a balance of probabilities.

THE SALIENT FACTS

[16] The basic fact relied upon by the appellant is that he was repeatedly taken to task about his debt of RM10,000 to his mother-in-law, and while his complaint is that his wife refused to sleep with him, PW6 said it was not true because his wife told PW6 so.

[17] According to the appellant in his testimony, PW6 raised this in a telephone call to him on 4 August 2007, and accused him of lying. This was

admitted during cross-examination by PW6 when recalled for cross-examination after the testimony of the chemist Mohd Fauze bin Mohamad Ayob ('PW8'):

Q: Benar atau tidak awak kata masa buat panggilan kepada OKT bahawa mereka bersama tapi sebenarnya mereka tidak bersama dalam satu rumah, adakah awak tanya itu?

A: Benar saya ada beritahu OKT.

Q: Benar atau tidak bahawa awak telah memarahi OKT kerana tak membayar hutang emak mertua sebanyak RM10,000?

A: Tak benar, saya tak bertanya tentang hutang RM10,000 itu.

Q: Apa sebenarnya perbualan awak dengan OKT pada 4/8/2007 itu?

A: Perbualan antara saya adalah seperti keterangan saya terdahulu iaitu tentang duduk bersama dan saya marah OKT kerana dia berbohong.

Q: Awak marah OKT?

A: Benar saya marah dia melalui telefon saya.

Q: Dalam keadaan marah awak pun terus meletakkan telefon?

A: Benar.

[18] In his testimony, the appellant asserted further that the deceased was not in their house when he returned home at midnight on 4 August 2007. He said he went to his mother-in-law's house at 6.45am and found the deceased cradling her elder brother's child, and when he asked her for discussion she had called PW6 who told him not to make a fuss there, and if he wanted to, to do so in his own house. Then the deceased, PW6 and himself went back to his house, where they sat down in the living room to discuss but a quarrel began about whether he was sleeping with his wife or not.

[19] But neither in the main cross-examination nor when recalled was this version put to PW6 to be tested. Regardless whether PW6 confirms or disputes it, putting the appellant's version to PW6 enables the trial judge to see and hear PW6's responses himself and enables him to decide who is more credible and therefore his or her version is safer to accept. Without putting his version to PW6 it is impossible to give much weight to his untested version.

[20] The appellant had further testified that not wanting to discuss their private matters before a third party, he had asked his wife to go to the bedroom. This seems to contradict what he later said in cross-examination that other members of the family knew of his marital problems:

Q: Tapi awak tak ambil tindakan untuk bubarkan perkahwinan ini?

A: Benar, Y.A.

Ya, saya ada terima panggilan telefon daripada Nalini sehari sebelum kejadian. Kami bincang mengenai perhubungan sulit antara saya dengan isteri. Masalah hubungan intim saya dengan isteri ini memang diketahui oleh ahli keluarga yang lain.

Q: Ahli keluarga lain pun tahu tentang awak marah isteri berikutan masalah hubungan intim itu?

A: Ya, benar.

[21] The appellant told the court that in the bedroom the deceased avoided him when he tried to get near her, and he had accused her of not looking after their child. He then had slapped her, whereupon she became angry and said she wanted to leave him and return to her mother. He said that in anger he said the same thing to her that he would return to his mother's house. He told the court that he then took his clothes from the closet, put them in a bag, put on his helmet, got on his motorcycle, left the vicinity of the house and was at a three-way junction when he received a telephone call from the deceased and PW6. This is the critical part of his defence. He said:

… keluar daripada kawasan rumah dan setiba di satu simpang tiga saya terima satu panggilan telefon daripada Nalini. Seterusnya isteri saya juga ada menelefon saya. Mereka gunakan telefon yang sama. Mula Nalini bercakap dan kemudian Nalini serahkan telefon kepada isteri saya untuk bercakap. Semasa Nalini menghubungi saya melalui telefon dia kata yang saya selalu mengatakan isteri enggan tidur bersama sebaliknya isteri kata saya selalu bersama dengan isteri dan Nalini suruh saya bercakap sendiri dengan isteri saya dan serah handphone itu kepada isteri saya. Saya beritahu isteri saya supaya jangan buat saya gila iaitu kami tidak tidur sama tapi dia kata ada tidur bersama. Saya kemudian terus patah balik ke rumah saya dan tak jadi pergi ke rumah ibu saya.

Saya masuk ke dalam rumah dan tinggalkan beg plastik dekat motosikal di luar rumah dan helmet saya telah jatuh ke atas jalanraya. Saya masuk ke dalam rumah dan saya nampak Nalini duduk di ruang tamu dan isteri berdiri di hadapan bilik. Saya terus mengangkat satu periuk kecil dan gunakan periuk kecil untuk memukul isteri saya. Periuk kecil itu adalah periuk aluminium. Saya memukul di bahu kanan dan bahu kirinya dan isteri gunakan 2 tangannya untuk menghalang pukulan saya. Kemudian saya naik marah dan gunakan periuk yang sama dan pukul kepala saya sendiri. Seterusnya saya letakkan periuk dan menuju kepada isteri saya. Saya gunakan tangan kanan saya memegang leher isteri saya. Saya hanya memegang leher dia sahaja.

Saya memegang leher isteri dan menolak dia ke atas katil. Isteri saya telah jatuh ke atas katil dan saya terus naik dan duduk atas isteri saya. Saya menggunakan kedua-dua tangan saya dan memegang leher isteri saya. Saya beritahu isteri saya yang dia telah menjahanamkan hidup saya. Saya terus menjerit dan kata dia telah jahanamkan hidup saya. Ketika itu Nalini berada di belakang saya dan melihat segalanya. Saya lihat isteri saya sedang merenung kearah saya dan tak berkata-kata

apa-apa. Isteri saya sedang menahan nafasnya. Seterusnya saya nampak isteri saya menutup kedua-dua matanya. Ketika itu Nalini pegang tangan saya dan tarik saya.

Saya nampak isteri dalam keadaan tak sedar diri dan pengsan. Seterusnya saya dengar jeritan Nalini dan Nalini cuba mengejutkan isteri saya.

[22] The appellant's version of having left the house, and receiving a telephone call from PW6 and the deceased that he said drove him mad, causing him to return to the house, to hit the deceased with an aluminium pot, to hold the deceased down on the bed by the neck with both his hands and to shout that she had destroyed his life, seeing the deceased staring at him, holding her breath and then closing both eyes, with PW6 seeing all this from behind him in the bedroom, is a version that involves PW6 extensively, and obviously ought to have been put to PW6. It was not. This version emerged only when the appellant testified. These facts relied upon by him were therefore not tested before the trial judge against another witness who was there. By such failure, the appellant denied himself from the benefit of the trial judge being enabled to determine if his version is safe to rely on, and if so to give a greater weight to it. This is particularly important in light of the burden that is upon him to prove his defence upon a balance of probabilities.

[23] It is explained in s 300 that whether there was grave and sudden provocation is a question of fact:

Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

[24] The trial judge in this case had found that the appellant had failed to prove upon a balance of probabilities that the provocation was grave and sudden enough to prevent the offence from amounting to murder.

[25] It has been held by the Eusoffe Abdoolcader FC, delivering the decision of the Federal Court in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ 10; [1983] CLJ 101 (Rep) (FC):

The credibility of a witness is primarily a matter for the trial judge. There is a homogeneous concatenation of authority on this principle and we refer to the locus classicus on this aspect in a passage in the judgment of Lord Thankerton in *Watt or Thomas v Thomas* [1947] AC 484 (at p 487). The Privy Council said in *Antonio Dias Caldeira v Frederick Augustus Gray* [1936] MLJ 110; [1934] 1 LNS 5 that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but

be convinced that it is wrong. We feel that the following passage (at p 138) from the judgment of that board in that case delivered by Lord Alness bears citation in extenso:

The appellant is exercising a right of appeal which is his by right, and Their Lordships recognise that they cannot merely because the question is one of fact, and because it has been decided in one way by the learned trial judge abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong. Nonetheless, the functions of a Court of Appeal, when dealing with a question of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope.

This is familiar law. It has received many illustrations — and, in particular in the House of Lords —, the most recent of these being the case of *Powell & Wife v Streatham Manor Nursing Home,* [1935] AC 243; 104 LJ KB 304; 152 LT 563; 79 SJ 179; 51 TLR 289. In that case it was held that:

Where the judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be: and the appellate tribunal will generally defer to the conclusion which the trial judge has formed.

Lord Wright, in the course of his speech, said:

Two principles are beyond controversy. First it is clear, that, in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.

[26] We examined the facts and the evidence of this case to decide whether we are convinced that the trial judge was wrong.

[27] We observe from the record of proceedings that although the prosecution suggested that the deceased had not further provoked the appellant when he as he testified had returned to the house, and he had denied the suggestions, the appellant in his re-examination only testified as follows:

Pada hari kejadian perselisihan faham saya dengan isteri lain daripada hari-hari biasa, ianya perselisihan faham yang besar sehingga saya naik marah. Saya memang tak ada niat untuk membunuh isteri saya.

Setelah keluar daripada rumah saya naik motosikal dan terima panggilan telefon. Saya pulang semula ke rumah dan masa itu pun saya tak ada niat pulang untuk bunuh isteri saya.

Saya tidak mencekik leher isteri, tapi hanya tahan dan pegang leher dia dengan tanpa tujuan untuk membunuh isteri saya.

Pada 5/8/2007, iaitu pada hari kejadian saya benar-benar marah kepada isteri saya perselisihan faham pada pagi kejadian adalah berat (great). Perselisihan ini tiba-tiba jadi berat pada hari itu sahaja.

[28] It is plain that even if the appellant's version of additional facts is accepted, that he had left the house, was further provoked in a telephone call, prompting him to return to the house, there is nothing in evidence to show how long or how soon was the telephone call between leaving the house, arriving at the junction and arriving back at the house to attack the deceased to discharge the burden that is upon the appellant to prove that the provocation, even if it is grave, is sudden enough before the act of strangulation to prevent the offence from amounting to murder. On the face of it there was time to cool off already before he received the telephone call at the three way junction. Even if that were accepted as provocation, then on the face of it he had to turn around and go back. But there was no evidence to show how soon after that provocation that he committed the strangulation. The question of how sudden must the provocation be to be enough to prevent the offence from amounting to murder did not arise for consideration.

[29] Furthermore, denial of conjugal rights by a spouse can never be accepted as a provocation by that spouse, let alone a grave provocation. The provocation in this case must have referred to repeated accusation of not paying off a debt to his mother-in-law and that he was lying when he said he was denied conjugal rights, and the maintenance of those accusations in the telephone call he said he received at the three way junction after he left the house. But then that accusation, according to the appellant himself, had been made before, and was made by PW6 and not the deceased. All that is evident is that the deceased told PW6 that she had not denied the appellant his conjugal rights, when to the appellant maintains he had been so denied.

[30] Having heard the submissions on the appeal before us, and upon reading and consideration of the grounds of judgment of the trial judge, we are not convinced that the trial judge was wrong in his findings. We conclude he had not erred in holding that the appellant had failed to prove, upon a balance of probabilities, that, borrowing the language of George Seah SCJ in *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] CLJ 143 (SC) that there was such grave and sudden provocation that a reasonable person, belonging to the same class as the appellant, and placed in the situation of the appellant, would be so provoked as to lose self-control. At para 32 of his judgment, the trial judge made it clear he applied this test. He cannot be said to have ignored the situation the appellant found himself in, as he asserted, of repeated accusations as to his debt and false accusation of lying that he was not denied conjugal rights. Repetition of the accusation when he had already left the house

and was at a three way junction can at best be termed as the straw that broke the camel's back, but is not provocation so grave and sudden as to prevent his offence from amounting to murder.

[31] Accordingly, we dismissed the appeal and affirmed the conviction and sentence.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar